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Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy

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I. INTRODUCTION

The most important, and certainly the most ambitious, modification of international law in this century has been the outlawing of the use of force to settle international disputes. The definitive prohibition on the use of force came with the adoption of the United Nations Charter and, in particular, Charter article 2(4).[1] Louis Henkin has written:

> Article 2(4) is the most important norm of international law, the distillation and embodiment of the primary value of the inter-State system, the defence of State independence and State autonomy. The Charter contemplated no exceptions. It prohibits the use of force for selfish State interests ("vital interests") as well as for benign purposes, human values. It declares peace as the supreme value, to secure not merely State autonomy, but fundamental order for all. It declares peace to be more compelling than inter-State justice, more compelling even than human rights or other human values.[2]

For a short while, from 1991 until 1994, it appeared that a majority of Security Council members had re-interpreted the Charter's order of priorities. To some, it seemed that the Council had placed such values as human rights, self-determination, and even democracy above the

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1. "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations." U. N. CHARTER, *done at* San Francisco, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153, *as amended* 24 U.S.T. 2225, T.I.A.S. 7739 art. 2, para. 4.

2. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS, VALUES AND FUNCTIONS 146 (1990).

value of peace through respect for State autonomy.[3] A careful examination does not support the conclusion that the Security Council accomplished a real re-ordering. However, to the extent that Security Council members may have moved away from the traditional interpretation of the Charter, restated above by Henkin, they have now returned. The experiment with re-ordering priorities has ended. Peace through respect for State autonomy has again, for better or worse, returned as the primary value. This article examines the period of reinterpretation: 1991-1994. Section two begins by confirming Henkin's observation that the Charter was designed to enshrine preservation of the peace as the supreme value of the international community, even at the expense of other values. As Henkin points out, preserving the peace was thought to support State autonomy and, more importantly, fundamental order for all. As noted by Henkin in the quotation above, the drafters of the Charter believed that respecting State autonomy could guarantee peace. Section two aims to link this ordering of values more directly to the Security Council and States. Section three then looks closely at the significant events of the period of Security Council activism, which some believe changed the original Charter design. The result of the analysis in this article, however, finds that on only one occasion, in the case of Haiti, did the Security Council unambiguously re-interpret the plain words of the Charter. This re-interpretation has not been repeated. The conclusion here is that, at least through the beginning of the 21st century, the Security Council will continue to respect the value of State autonomy in its efforts to keep the peace.

II. THE CHARTER CONCEPT

The Charter's rules on use of force may be divided into three categories: rules governing the use of force by individual States; rules

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3. "In the Post-Charter Self-Help paradigm, justice is valued above peace. States are claiming the right to use force to promote certain 'just' goals. The major difficulty with this formulation is that different groups of states have offered differing and often contradictory definitions of what a 'just' goal is . . . . Specifically, it could be argued that in light of recent developments, there is a consensus that it is proper to use force to promote democratic self-determination in the western sense of the term." ANTHONY C. AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 191-92 (1993). *See also* John Stremlau, *Sharpening International Sanctions, Toward a Stronger Role for the United Nations*, A REPORT TO THE CARNEGIE COMMISSION ON PREVENTING DEADLY CONFLICT 17 (1996); Jarat Chopra & Thomas G. Weiss, *Sovereignty is No Longer Sacrosanct: Codifying Humanitarian Intervention*, 6 ETHICS & INTERNATIONAL AFFAIRS 95, 97 (1992/3).

governing the use of force by the Security Council; and rules governing the use of force by regional organizations. In the classical interpretation of each of these sets of rules we see the effort to protect State autonomy.

A. Individual States

For the individual State, article 2(4) of the Charter prohibits the use of force except in self-defense against an actual armed attack, and even then only until the Security Council acts.[4] This rule provides ultimate protection for State autonomy—no State may be threatened by another State's decision to use force. Regardless of a State's violations of international law, it cannot be attacked by another State unless the violator State has attacked first. States have not opposed or attempted to reinterpret this basic principle since the Charter's adoption. For the most part, States have reinforced the principle. The International Court of Justice, in a case brought by Nicaragua against the United States in 1986,[5] authoritatively demonstrated the continuing vitality of article 2(4) in its original form. The Court confirmed that under international law States may only use force when responding to an actual armed attack. The Court stated that shipments of weapons from one State to rebels fighting the government of another State would not amount to an armed attack. This finding is consistent with the Definition of Aggression,[6] which lists actions equivalent to an armed attack.[7] According to article 3(g) of the Definition, an armed attack which triggers the right to use force includes: invasion of territory, bombardment of territory, blockade of ports, attack on air, sea, or land forces, and the "sending . . . of armed bands, groups, irregulars or mercenaries, which carry out

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4. "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." U.N. CHARTER, *supra* note 1, art. 51.

5. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

6. *See* G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631 (1974).

7. *See* HILAIRE MCCOUBREY & NIGEL D. WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 51-52 (1992).

acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."[8]

While States have not challenged the core principle of article 2(4), some States have from time to time pressed for exceptions. For example, the drafters of the Definition of Aggression included a clear exception to the generally accepted meaning of 2(4). In article 7, the Definition says that the right of self-determination, particularly by peoples under "colonial and racist regimes or other forms of alien domination," is not intended to be limited by the Definition and neither is the "right of these peoples to struggle . . . and to seek and receive support . . . ." This exception remains controversial. It certainly tended to undermine the autonomy of former colonial powers such as France and the United Kingdom. The United States, in particular, doubted its legality. Today, the chief sponsors of the exception argue that it is no longer relevant since the days of colonialism and apartheid are over. The States of the developing world, particularly in Africa, have spoken strongly in favor of the value of autonomy and have always considered the application of article 7 to be limited.[9]

Another much-discussed exception to the prohibition on the use of force is the right to rescue nationals. In the 1970s, terrorists captured a jet carrying mostly Israeli citizens. Uganda allowed the plane to land at its Entebbe airport, then proceeded to assist the terrorists. Ugandan army personnel held Israeli passengers on the plane to pressure Israel into accepting the terrorists' demands.[10] Israel flew a specially-trained unit to Entebbe where, with a minimal use of force (small arms, rather than major weapons systems), the passengers were rescued and flown out of the airport. This action met with general international approval. However, it is the only example of its kind. No doubt if another incident of the same nature occurred, a similar rescue would also not be condemned, but whether the Entebbe rescue alone can be said to have created an exception to article 2(4) is legally hard to conclude.[11]

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8. G.A. Res. 3314, *supra* note 6, at 143.

9. One sees the limitation quite clearly in, for example, The Charter of the Organization of African Unity, *done at* Addis Ababa, May 25, 1963, art. 3, 2 I.L.M. 766 (1963).

10. A. MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II 276-78 (1997).

11. For a fuller discussion of these issues, see THOMAS EHRLICH & MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE (1993); HENKIN, *supra* note 2, 142-62; Louis Henkin, *Use of Force: Law and U.S. Policy, in* RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE 37 (Louis Henkin et al. eds., 2d ed. 1991); Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1624-27 (1984).

States have not pressed during the period under review for any other exceptions, although some scholars have.[12] A few international lawyers have argued that individual States should have the right to intervene militarily to enforce international human rights law. They argue that the United Nations Charter promotes both peace and human rights and that we should not give the peace rules priority over human rights rules by limiting the enforcement powers of States.[13] This argument cannot withstand legal scrutiny. While the Charter's human rights provisions are aspirational and future-oriented, article 2(4) is emphatic and unconditional.[14]

Re-ordering these priorities requires re-interpretation, at the least, of current Charter language. Some argue that, despite the current language, as long as the Security Council has not acted to fulfill its duties under the Charter, individual States may so act.[15] While it is clear that the Council has not fulfilled many of its obligations under the Charter, it is not clear that it is obliged to use force in the enforcement of human rights law. This question will be discussed below. Should it be determined that the Council does have this obligation, it is not a logical continuation to say that the responsibility can be assumed by individual States. The Council is a multilateral body, with its authority to act granted by treaty. A single State cannot assume this authority in contravention of the rules binding individual States. Most importantly, there is no State practice to support this argument. No State has ever argued that it has the right to act in lieu of the Security Council.

Some proponents of a right of humanitarian intervention cite the Tanzanian invasion of Uganda, the Vietnamese invasion of Cambodia, and the Indian invasion of West Pakistan as examples.[16] In fact, neither Vietnam nor Tanzania justified their invasions as humanitarian. To the extent that India did, its intervention was internationally condemned.[17]

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12. *See* discussion in HENKIN, *supra* note 2, at 150-54.

13. *See, e.g.*, FERNANDO R. TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 138-41 (1988); Jean-Pierre L. Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations, in* HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 200, 200-01 (Richard B. Lillich ed., 1973) (appendix).

14. *See* EHRLICH & O'CONNELL, *supra* note 11, at 306, 328.

15. *See id.*

16. *See* Richard B. Lillich, *Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives, in* LAW AND CIVIL WAR IN THE MODERN WORLD 229, 244-51 (John Norton Moore ed. 1974).

17. *See* Mary Ellen O'Connell, *Enforcing the Prohibition on the Use of Force: The U.N.'s Response to Iraq's Invasion of Kuwait,* 15 S. ILL. U. L.J. 453, 474-75 (1991).

The most common use of force by States across international boundaries since the adoption of the Charter has been the sending of troops at the request of governments. France, for example, has sent intervention forces to Africa every other year on average. The United States justified its interventions in Vietnam, Grenada, Panama, El Salvador, and the Dominican Republic as requests by the governments for assistance. The Soviet Union justified its interventions in Czechoslovakia, Hungary, and Afghanistan as requests by the governments. If a request creates a lawful exception, it must of course be a legitimate request by a government in effective control of a State. We know that the requests to intervene in Vietnam, Grenada, Panama, Afghanistan, Czechoslovakia, and Hungary lacked some or all of these requirements. Therefore, the interventions were not lawful exceptions to article 2(4).

Where a lawful request has been made in the event of an armed attack on a State, article 51 contemplates collective as well as individual self-defense. As for cases in which a government in effective control of a State actually made a legitimate request for assistance in the case of civil war, there is even some question whether these were lawful interventions. On the one hand, governments may consent to or request the presence of foreign troops in peace time. There is probably no question about such troops participating in policing or riot control. But on the other hand, when an organized group seeks to overthrow a government or secede from a State, the use of foreign troops against them raises the question whether the rebels' right of self-determination is restricted. According to Doswald-Beck:

> It is submitted that there is, at the least, a very serious doubt whether a State may validly aid another government to suppress a rebellion, particularly if the rebellion is widespread and seriously aimed at the overthrow of the incumbent regime. The combination of [General Assembly] Resolutions 2131(XX) and 2625(XXV), taking into account the motivation behind these resolutions, of the fact that States justify such interventions on the basis of prior outside intervention, and of the number of statements stressing true independence, self-determination and non-intervention in internal affairs, provides substantial evidence to support a theory that intervention to prop up a beleaguered government is illegal.[18]

18. Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 251 (1985).

Military aid to the rebels themselves is self-evidently unlawful, except perhaps, as described above, to rebels seeking to overthrow colonialist or racist regimes. The International Court of Justice found, however, that the provision of humanitarian aid, even to rebels, is not unlawful under international law.[19] It also found that low-level provision of assistance to rebels, in the form of limited shipments of conventional weapons, while an unlawful interference in the internal affairs of the victim State, could not be considered an armed attack. Therefore, such assistance does not trigger the right to use force in self-defense in the territory of another State and *a fortiori* does not trigger the right of collective self-defense. States may use force in self-defense if, and only if, an armed attack occurs.[20]

The Court also found that any lawful provision of assistance in effective self-defense can only occur after a formal request by the government. The United States failed to produce evidence that El Salvador had ever formally requested U.S. assistance to counter Nicaraguan aid to rebels in El Salvador. The Court found that without such a request, even if the other facts of the case were as the U.S. argued, the U.S. could not legally use force against Nicaragua.

It would have been helpful to the law if the Court had more clearly defined "armed attack" under international law. As discussed above, it ruled out low-level shipments of weapons, but did not address terror campaigns, assassinations, or attempted assassination of heads of state or former heads of state. It would also have been helpful if it had said something definitive about anticipatory self-defense. There seems to be no reason not to use the formula of the Caroline Doctrine, according to which a government may use force in anticipation of an armed attack if the "necessity of that self-defence, is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[21]

In summary, under the Charter as drafted and under the practice of the first fifty years after the adoption of the Charter, States could employ force under only one rule of international law: in self-defense. For part of this period, States might also have been permitted to use force to help realize the right of self-determination by peoples under colonial or racist domination. The legal right of States to challenge each others' autonomy for any reason by the use of force was eliminated with the adoption of the Charter.

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19. *See* Military and Paramilitary Activities in and against Nicaragua (Nicar. v. US), 1986 I.C.J. 14 (June 27).

20. *See* EHRLICH & O'CONNELL, *supra* note 11, at 344.

21. JOHN B. MOORE, 2 A DIGEST OF INTERNATIONAL LAW 412 (1906).

B. *The United Nations*

The United Nations operates under a different set of rules than individual States. The Security Council was given broader authority to use force: it could respond to threats of aggression as well as to breaches of *international* peace. But the Charter does not explicitly authorize the use of force to enforce other values. Thus, article 24(1) outlines the Council's mandate:

> In order to ensure prompt and effective action by the United Nations, its members confer on the Security Council primary responsibility for the maintenance of *international peace and security*, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.[22]

Article 39 provides that:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with articles 41 and 42, to maintain or restore *international peace and security*.[23]

Finally, the Charter explicitly restricts responses to violent conflict within States in article 2(7):

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.[24]

When the Security Council finds a threat to or breach of international peace or other act of aggression, it may order or recommend, per article 41, the use of measures short of force, including "interruption of

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22. U.N. CHARTER *supra* note 1, art. 24, para. 1 (emphasis added).

23. U.N. CHARTER *supra* note 1, art. 39 (emphasis added).

24. U.N. CHARTER *supra* note 1, art. 2, para. 7. Some have argued that this reference to Chapter VII permits the Security Council to take action in domestic situations. *See, e.g.*, Winrich Kühne, *Völkerrecht und Friedenssicherung in einer turbulenten Welt: Eine analytische Zusammenfassung der Grundprobleme und Entwicklungsperspektiven 17, 28 in* BLAUHELME IN EINER TURBULENTEN WELT (Winrich Kühne ed., 1993). This reading, however, is inconsistent with the words of Chapter VII itself, which limits Security Council action to responses to threats or breaches of international peace. Where there is a mixed conflict involving international peace and domestic affairs, the Security Council could act and it is to these situations that article 2(7) is referring. *See* MCCOUBREY & WHITE, *supra* note 7, at 73-74.

economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." Should these measures prove inadequate, the Council may under article 42 "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security." These forces were supposed to have been made available to the Council on the basis of pre-existing agreements established under article 43. The agreements were supposed to provide for troops that would be available on an urgent basis (article 45), and there was also to be a military staff committee to advise the Council about the preparation of and use of the troops (article 47).

The article 43 agreements were never implemented nor has the Military Staff Committee ever advised the Security Council. Thus, despite all of the conflict during the years after the adoption of the Charter and before the end of the Cold War, the Council only declared threats to international peace four times. It ordered economic sanctions against Rhodesia and South Africa and ordered troops to Korea and the Congo.[25]

Thus, as stated above, the Security Council's authority to use force is broader than that of individual States. It has the right to respond to threats as well as to actual breaches of "international peace" and acts of aggression.

By "international peace," however, it is understood here that the drafters of the Charter meant to restrict the Council's authority to intervene in civil war despite such wars being breaches of "peace." As mentioned above, article 39 refers to the Council's right to *take measures* only in response to breaches of *international* peace, and article 2(7) plainly states that the internal affairs of members are out-of-bounds for the Organization. This limitation is consistent with the Charter's preservation of the "autonomy" value. Civil war has always been viewed as an internal matter. Indeed, before democracy's current popularity, it was a typical way many States changed governments. The drafters did not give the Organization the ability to dictate the outcome of such typical struggles.[26] Finally, there was no indication from the practice of the Organization that it could so intervene. The closest the U.N. has come to intervening in a civil war was in the Congo in 1960. The Security Council initially authorized U.N. intervention to counter Belgian intervention on the eve of Congolese independence. The U.N.,

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25. *See generally* GEORGES ABI-SAAB, INTERNATIONAL CRISES AND THE ROLE OF LAW: THE UNITED NATIONS OPERATION IN THE CONGO 1960-1964 (1978).

26. *See* HENKIN, *supra* note 2, at 165-67.

however, ended up fighting alongside the central government against the people of Katanga province who were attempting to secede. The U.N. endeavored to remain neutral but could not and, thus, tipped the balance against those striving to secede.[27]

The Security Council's actual observation of the legal restrictions on intervention in civil conflicts was aided by the Cold War competition between the United States and the Soviet Union. The Cold War meant that a decision by the Council to use force was generally viewed as favoring or disfavoring one side or another. As so characterized, a veto was inevitable. The intervention in Korea could only occur because at the time of the North's invasion, the Soviet Union was boycotting the Council.[28] In the Congo, the General Assembly called for the sending of volunteers, which the French and the Soviets both called a contravention of the Charter.[29] They refused to pay the expenses associated with the Congo action. This resulted in the establishment of a separate account for peacekeeping expenses, to be paid voluntarily.[30]

Indeed, the problem of getting Security Council consensus, despite the clear interest and desire of the international community to respond to conflicts, led to the development of "peacekeeping." The term peacekeeping does not appear in the Charter. The Council has no express authority to send peacekeepers. But U.N. lawyers have always argued that as long as peacekeeping actions have the consent of all the parties to the particular conflict, act impartially, carry only defensive weapons, and intervene only following a cease-fire, there could be no real legal challenge to their deployment. Under Chapter VI of the Charter, the Security Council has authority to recommend to States a variety of measures for peaceful settlement of disputes and under Chapter VII it can send troops of the member States to conflict areas.

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27. *See* NIGEL D. WHITE, THE UNITED NATIONS AND THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY 50-51 (1990). *See generally* ABI-SAAB, *supra* note 25.

28. When the Soviet Union returned to the Council, the U.S. tried to devise an end run around the Council using its many allies in the General Assembly. In November 1950, the Assembly adopted the *Uniting for Peace* resolution, which gave it power to discuss and make recommendations on matters of peace and security if the Council found itself deadlocked. Members were also to hold armed forces ready in the event that the Council failed to act. The Uniting for Peace resolution was first used in 1954 when the U.K. and France vetoed Security Council resolutions during the Suez crisis. Following a General Assembly demand to do so, those two countries did withdraw their troops. But the Soviet Union did not in 1956, when it was called upon to pull its troops out of Hungary. *See generally* ROBERT R. BOWIE, INTERNATIONAL CRISES AND THE ROLE OF LAW: SUEZ 1956 (1974).

29. *See id.*

30. *See* Certain Expenses of the United Nations, 1962 I.C.J. 151, 156 (July 20).

Putting these provisions together, international lawyers believe the authority can be found.

Before the end of the Cold War, seventeen peacekeeping missions were organized. These missions aided compliance with cease-fires by literally imposing blue-helmeted soldiers between warring factions or setting up observer posts to report breaches of the cease-fire. Peacekeepers were not, however, peace enforcers—they could not take coercive action to compel compliance with a cease-fire.[31]

C. *Regional Organizations*

According to article 53(1):

> The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . . .[32]

The Organization for Security and Cooperation in Europe (OSCE) considers itself to be such a regional organization. The North Atlantic Treaty Organization (NATO) apparently does not.[33] Thus, article 5 of the North Atlantic Treaty,[34] which is similar to article 4 of the old Warsaw Treaty,[35] states:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized in article 51 of the Charter of the United Nations will assist the Party or Parties so attacked . . . .[36]

When acting in self-defense, NATO would still require the authority of the right of individual or collective self defense under article 51. Non-self-defensive actions, like those undertaken by the Implementation

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31. For a comprehensive discussion of peacekeeping under international law, see WHITE, *supra* note 27, at 172-76.

32 U.N. CHARTER, *supra* note 1, art. 53(1).

33. *See* Willem Van Eekelen, *The Security Agenda for 1996: Background and Proposals*, 9 CENTER FOR EUROPEAN POLICY STUDIES (CEPS Paper No. 64, 1995).

34. North Atlantic Treaty, 34 U.N.T.S. 243, 43 AM. J. INT'L L., Supp. 159 (1949).

35. The Warsaw Pact, 49 AM. J. INT'L L. Supp. 194 (1955).

36. North Atlantic Treaty, *supra* note 34, art. 5.

Force for Bosnia (IFOR), would clearly require Security Council authorization under article 53. NATO's first actions did not occur until the end of the Cold War, and in all those cases upon a request or authorization by the Security Council.[37]

III. A PERIOD OF ACTIVISM

With the end of the Cold War, the veto ceased to be a problem. The U.N. Security Council was able to respond more closely to the original plan of the Charter when, by unanimous vote, it found that Iraq had violated article 2(4) by its invasion of Kuwait. The Council did not, however, authorize its own force, but rather, akin to the action in Korea, it authorized a coalition of national forces under United States command to respond to the aggression.

Had the Security Council failed to act promptly, the coalition might have invoked article 51, if requested by Kuwait. Under that article, the victim of such a clear case of armed aggression may request the help of other States, pending Security Council action. In this instance, however, the Security Council played an active role, as contemplated by the Charter. Viewing the events following the Iraqi invasion, it will be seen that the Security Council then began pressing the limits of its authority, only to return to a more conservative position by 1994.

A. The Iraqi Exclusion Zone

It was with the establishment of the Iraqi Exclusion Zone that the international community saw the first indication of a new attitude towards the Charter by the Security Council. At the end of February 1991, as the fighting to liberate Kuwait was ending, the Kurds of northern Iraq began a rebellion against the Iraqi government, apparently either to secede from Iraq or at least to establish an autonomous Kurdish region.[38]

This development seems to have caught the U.N. and the coalition off guard. Both resisted initial calls for intervention on behalf of the Kurds. The United States took the position that it could not intervene

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37. *See, e.g.*, U.N. SCOR Res. 1031 (1995) (authorizing IFOR).

38. For a detailed account of these events, see Mary Ellen O'Connell, *Continuing Limits on UN Intervention in Civil War*, 67 IND. L.J. 903, 904-09 (1992).

militarily to support the uprisings because intervention would be unlawful interference in Iraq's internal affairs.[39] The French agreed with this legal assessment, but argued that "[t]he law is one thing, but the safeguard of a population is another, quite as precious, to which humanity cannot be indifferent."[40]

> France said it would try to get the law changed to allow intervention. France could not, however, persuade the other permanent members of the Security Council to authorize force to liberate the Kurds. Instead, the Council ordered only humanitarian aid on the Kurds' behalf. In Resolution 688, the Council found that Iraqi attacks on the Kurds constituted a threat to peace in the region . . . . In the subsequent operative paragraphs of the resolution, the Council called on Iraq to end its repression of the Kurds and to allow international humanitarian assistance to reach northern Iraq. This [was] as far as the Council could go without inviting a Chinese veto or failing to get the required two-thirds vote of the fifteen-member Council. As it was, China and India abstained from supporting the resolution, while Cuba, Yemen and Zimbabwe voted against it. All stated they believed the resolution interfered in Iraq's internal affairs.[41]

U.N. assistance in creating a new State for the Kurds would clearly have challenged Iraq's autonomy. At first, the U.N. stopped short of such a challenge—providing humanitarian aid is not considered to be interference with internal affairs and therefore is not unlawful. Creating the protective zone, however, went well beyond distributing humanitarian aid. There is a question whether such a move was really authorized by the Security Council. The British have argued that Resolution 688, read together with Resolution 678 (which authorized all means to bring peace to the region), did provide authority to create the zone as part of the response to Iraq's violation of international peace.[42] It appears that Iraq gave consent to the establishment of the zone in May, 1991. It was then that Coalition forces left the area and United Nations "police" entered.[43] Subsequent cases more clearly defined the trend begun in Iraq.

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39. *See id.* at 905.

40. FINANCIAL TIMES, Apr. 5, 1991, at 4, col. 4 (Statement of French Foreign Minister Roland Dumas).

41. O'Connell, *supra* note 38, at 905-06.

42. *See id.* at 906-07.

43. *See id.* at 909. *See also* MCCOUBREY & WHITE, *supra* note 7, at 176.

B. Yugoslavia

In mid-summer 1991, fighting broke out in Yugoslavia between the province of Croatia, which had declared its independence, and the Yugoslav federal government. This conflict also raised the question of U.N. intervention in civil war.

In the early months of the war, the U.N. played no role. The European Community (EC) wished to mediate the conflict, declaring it a European matter. But the EC had not succeeded in getting a cease-fire by mid-September. The Security Council then became involved, beginning with Resolution 713, which imposed an arms embargo on the entire territory of the former Yugoslavia. This embargo had the consent of Belgrade, and thus avoided a Chinese veto. In November 1991, Zagreb and Belgrade agreed to the formation of a peacekeeping force, the United Nations Protection Force (UNPROFOR), to act as a buffer under Resolution 743. To this point, no significant departures from traditional peacekeeping practice are evident. However, Resolution 743 states that UNPROFOR was needed because "the situation in Yugoslavia continues to constitute a threat to international peace and security." There was no tangible threat to other independent States and it appeared that this language was included with a possible view that UNPROFOR would be more than a buffer, that it would be used to stop a civil war. The Council oddly enough failed to give a clear mandate to that effect, nor did it provide the resources to support such an effort. Indeed, the later assessment that UNPROFOR was a failure is linked largely to what is viewed as its unclear mandate.[44] By May 1992, the former Yugoslav republics of Slovenia, Croatia, and Bosnia were admitted to the United Nations. The conflict became an international one and, as such, fell under the traditional interpretation of the Charter in connection with the former Yugoslavia. With the recognition of the three new States, the dispute was clearly international, and no longer could be deemed an internal affair of Yugoslavia. No longer were there any indications of a new interpretation of the Charter that could infringe upon the value of State autonomy.

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44. *See* James B. Steinberg, *International Involvement in the Yugoslavia Conflict, in* ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 27, 40 (Lori F. Damrosch ed., 1993) [hereinafter ENFORCING RESTRAINT].

C. *Somalia*

On December 3, 1992, the Security Council authorized an action similar to those undertaken in northern Iraq and at the beginning of the Yugoslav crisis. In Resolution 794, the Council authorized "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.... [T]he ... magnitude of the human tragedy in Somalia constitutes a threat to international peace and security." As explained above, the authorization of protection to humanitarian relief poses a minimal challenge to autonomy.

In Somalia, however, the Council again indicated a willingness to reduce the limit of article 2(7) and expand its interpretation of article 39. Under Resolution 814, the Council ordered troops wearing blue helmets—some under U.N. command and others under U.S. command—to disarm warring parties and armed bands.[45] Secretary-General Boutros-Ghali called this the first time the U.N. had used force for "exclusively, humanitarian, internal reasons."

But the situation was not as clear-cut as that. In Somalia's case, it was hard to accuse the U.N. of interfering with internal affairs when the government had collapsed and chaos reigned. Even in that situation, the U.N. had organized a conference of factional leaders in Addis Ababa to get some sort of consent to the presence of the Blue Helmets.[46]

D. *Haiti*

It was, therefore, only in Haiti that the Security Council clearly went beyond the traditional Charter interpretation. In 1994, with Resolution 940, the Security Council found that the situation in Haiti threatened peace in the region. Yet, there was no threat to international peace.[47] A contingency of primarily American troops was authorized to use armed force to restore democracy. Due to the efforts of former U.S. President Jimmy Carter, force was not needed to oust the military dictatorship. However, the finding of the Security Council that it could

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45. *See* Kühne, *supra* note 24, at 25.

46. *See* Lucia Mouat, *U.N. to Break New Ground in Plan for Peacekeepers in Somalia,* CHRISTIAN SCIENCE MONITOR, Mar. 16, 1993, at 2; Mark R. Hutchinson, *Recent Development: Restoring Hope: U.N. Security Council Resolutions for Somalia and an Expanded Doctrine of Humanitarian Intervention,* 34 HARV. INT'L L.J. 624, 626 (1993).

47. *See, e.g.,* Michael J. Glennon, *Sovereignty and Community after Haiti: Rethinking the Collective Use of Force,* 89 AM. J. INT'L L. 70, 72 (1995).

authorize military intervention to restore democracy—in a place where a government was in effective control—is likely the zenith of the Security Council's reinterpretation of the Charter. There was an international concern in the case, namely the flight of refugees in small boats from Haiti, but it never amounted to a threat to international peace. The Security Council's position proclaimed that it could act beyond the restrictions of "threats to international peace" and authorize force to alter the internal affairs of a State.

IV. AN END TO ACTIVISM

In his report, *An Agenda for Peace*, Secretary-General Boutros-Ghali supported the expansionist trend in the Security Council interpretation of the Charter. His report calls for enforcement action to respond to human rights abuse and for nation-building. He developed ideas already advanced by his predecessor, Perez de Cuellar:

> The principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity . . . . We need not impale ourselves on the horns of a dilemma between respect for sovereignty and the protection of human rights . . . . What is involved is not the right of intervention but the collective obligation of States to bring relief and redress in human rights emergencies.[48]

Some believe that as a result of Iraq, Yugoslavia, Somalia, and Haiti, the Charter has been permanently re-interpreted. They argue that the Security Council may now intervene with military force to promote democracy, human rights, self-determination, or other humanitarian interests.[49]

Events since 1994, however, suggest a different conclusion.[50] Despite the Secretary-General's support and the precedents cited above, the Council itself seems to be turning away from the expansionist

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48. *Quoted in* Jarat Chopra, *Back to the Drawing Board*, 5 BULL ATOM. SCI. 29, 32 (Mar./April 1995).

49. *See supra* note 3 and accompanying text.

50. *See* HELMUT FREUDENSCHUß, BESCHLÜSSE DES SICHERHEITSRATES DER VN NACH KAPITEL VII: ANSPRUCH UND WIRKLICHKEIT, (VORTRAG GEHALTEN IM RAHMEN DES WATTHER-SCHÜCKINGS-KOLLEGS INSTITUT FÜR INTERNATIONALES RECHT AN DER UNIVERSITÄT KIEL 17, 21, July 15, 1994).

interpretation of the Charter. It has not responded to recent claims for self-determination, or even complaints of massive human rights abuse, when the interests of only one State have been involved. There have always been voices resisting intervention in internal affairs, in particular those of China, India, and several developing States.[51] But since 1994, others on the Council have joined this trend, certainly not only due to the view of the drafters that intervention in internal affairs may escalate to conflict, thus undermining the goal of peace. [52]

The Council made no move to support the Chechen bid for self-determination with the authorization of military force, even though some argue that their claim to self-determination is as good as that of many other groups that have recently received the support of the international community and the Security Council.[53] While Chechnya directly concerned Russia and, therefore, there was the likelihood of veto, many took the public position that it was an internal affair of Russia in which the Council could not intervene beyond raising concerns regarding human rights abuse.

Most spectacularly, the Security Council did nothing to stop the slaughter in Rwanda in the spring of 1994. The Rwandan conflict involved the crossing of many borders in the region. Moreover, the U.N. already had consented to be there. Nevertheless, showing its new reticence at becoming involved in such complicated conflicts, no intervention was authorized. Rather, the peacekeepers who were there were pulled out.[54]

Similarly, the conflict in Congo/Zaire had sufficient international elements to justify intervention. Rebels crossed international borders; and the opposing forces attacked refugee camps, humanitarian aid workers, and aid shipments. Nevertheless, no U.N. mission ever went forward. In late 1996, a Canadian-led multinational force got as far as positioning an advance party in the area before it was declared unnecessary. Information-gathering flights, primarily by U.S. aircraft, were utilized to assess the situation. The stated goal of the participants, who

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51. "Increasingly vocal Chinese concern that the U.N.'s non-interference principle (Article 2.7) not be further weakened resonates with many other developing countries." Stremlau, *supra* note 3, at 24. *See also*, Comments of Columbia, U.N. GAOR, 48th Sess. At 6-8, U.N. Doc. A/48/PV.41 (1993).

52. *See supra* note 3 and accompanying text.

53. *See* Trent Tappe, Note, *Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims*, 34 COLUM. J. TRANSNAT'L L. 255, 256 (1995).

54. *See* Winrich Kühne et al., *WEU's Role in Crisis Management in Sub-Saharan Africa*, 22 CHAILLOT PAPERS 31 (Dec. 1995).

included the U.S. and France, was to deliver humanitarian aid. Dr. William Perry, then the U.S. Secretary of Defense, clearly stated that robust rules of engagement would allow the troops self-defense, but that the U.S. was "not planning a mission to disarm or separate refugees."[55] The U.S. clearly intends to avoid a situation similar to that faced in Somalia, where an expanded mandate involved it in a complicated inter-tribal feud, and resulted in the deaths of eighteen American servicemen and the withdrawal of U.S. troops without any positive results.[56]

If the Security Council is unwilling to become involved in these conflicts, one seems safe in concluding that it will stay much farther away from legally questionable interventions.[57]

These developments can be explained by the fact that internal conflict is far more factually complicated, in almost all cases, than transboundary aggression. Determining whose cause the U.N. should support—whose cause is worthy enough for troops to die for—has been the heart of the problem. For the future, the Security Council will likely concentrate again on ameliorating suffering, responding to international conflict, and employing traditional Blue Helmet peacekeeping.[58] Some will argue that it is only the unwillingness of donor States to send troops which explains why the Security Council is not authorizing non-traditional interventions. This explanation begs the question of why States are unwilling to send troops. National leaders—certainly American leaders—do not wish to send their citizens to die in morally and legally ambiguous circumstances, of which civil strife is a prime example. This fact was known to the drafters of the Charter and the lesson was re-learned during te recent experience of Security Council activism.[59]

Has the Security Council's recent activism, nevertheless, had a lasting impact on the accurate interpretation of the Charter? The argument had been raised that while the Council's behavior may now

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55. *600 U.S. Troops From Vicenza Expected to Join Zaire Mission*, STARS AND STRIPES, Nov. 15, 1996, at 1.

56. For a detailed account of events in Somalia, see Jeffrey Clark, *Debacle in Somalia: Failure of the Collective Response*, *in* ENFORCING RESTRAINT, *supra* note 44; see also THE NEW INTERVENTIONISM 1991-1994 (James Mayal ed., 1996).

57. Freudenschuß, *supra* note 50, at 21.

58. *See, e.g.*, Shashi Tharoor, *Should UN Peacekeeping Go 'Back to Basics'?*, 37 SURVIVAL 52, 58 (1995/6).

59. Adam Roberts, *The Road to Hell . . . A Critique of Humanitarian Intervention*, 1993 HARV. INT'L R. 10, 13 (Fall 1993).

be more restrained, the legal situation is forever changed.[60] The argument is that, at least in legal theory if not in practical reality, the Security Council now has the authority to order the use of force in settings of non-international armed conflict. This is a difficult argument to sustain.

It is true that practice may be used in the interpretation of treaties.[61] In fact, some provisions of the U.N. Charter have been effectively modified through practice.[62] Yet treaty-modifying practice consists of repeated behavior, not just one unambiguous instance. Thus, while it is appropriate to raise the possibility that the Charter has been modified, to conclude that it actually has been changed would be an extreme position.

A related argument is made by those who view the Security Council as the ultimate fact-finder in determining what is "international peace." The argument is that the Council may determine any situation to be a threat to or breach of international peace—even wholly internal conflicts. Now that it has done so, those situations remain classified as threats to or breaches of international peace. Such a view is rational but is not consistent with the clear limitations placed on Security Council action in the Charter. It is a body formed under the Charter and limited by the Charter, including articles 2(7) and 39. It is not unfettered in how it behaves and is not legally competent to declare that black is red.[63]

The strongest response to both arguments raised above is evidence coming from the Security Council itself. As already discussed, Security Council members have themselves returned to the traditional interpretation of the Charter. If practice can change the Charter, the new conservatism should suffice to change it back. If the Council is the ultimate fact-finder, it is again looking for the crossing of an international boundary to authorize the use of force.

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60. *See* Dr. Georg Nolte, Remarks at the Workshop *Intervening for Peace*, Center for Applied Policy in Munich, Germany (Jan. 24, 1997).

61. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(b), 1155 U.N.T.S. 331, 340.

62. *See* Ian Brownlie, *The Decisions of Political Organs of the United Nations and the Rule of Law*, *in* ESSAYS IN HONOUR OF WANG TIEYA 91, 100-02 (Ronald St. John Macdonald ed., 1994); Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83, 96 (1993).

63. *See, e.g.*, Frederic L. Kirgis, *The Security Council's First Fifty Years*, 89 AM. J. INT'L L. 506, 537-38 (1995).

The point needs to be made with precision: human rights are a matter of international concern; human rights abuse breaches peace. Unless, however, an international boundary is crossed, or there is a threat that it will be crossed, the abuse of human rights is not a threat or breach of *international* peace. Very often serious human rights abuse does lead to breaches of international peace. That has been the case in Africa's Great Lakes region, in South East Asia, and in southern Africa. In all of these cases, the Security Council ordered—or could have ordered—mandatory action. Where international peace is not threatened, recommendations of action short of force are the maximum lawful action.[64]

It is also very possible that the next few years will see a change in the structure of the Security Council. All of the most likely scenarios would tend to favor a return to non-interference with the domestic affairs of States. For example, should the Security Council add five permanent seats (though probably non-veto holding), three are likely to go to developing countries. These are the very States most likely to experience internal strife and least likely to support intervention to sort out such conflicts, at least when wholly in one State.

The result will be that the Security Council will again place the value of peace through respect for State autonomy over other Charter values. Not everyone agrees with this ordering. But it is consistent with Professor Henkin's clear analysis of the teleology of the Charter.

64. *See* Mary Ellen O'Connell, The Enforcement of International Law (forthcoming).